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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LISA CASTLE, an individual, Plaintiff, vs. LABORATORY CORPORATION OF AMERICA doing business as LABCORP, a California Corporation; and DOES 1 through 100, inclusive, Defendants.	Case No. 2:17-cv-2295 BRO (PLAx) Honorable Beverly Reid O'Connell **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND ACTION TO STATE COURT** Date: May 22, 2017 Time: 1:30 p.m. Dept.: Courtroom 7-C Judge: Hon. Beverly O'Connell LASC Complaint filed: 02/21/2017 Trial Date: Not set

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Laboratory Corporation of America's ("Defendant") opposition to Plaintiff Lisa Castle's ("Plaintiff") Motion to Remand Action to State Court relies entirely on (1) speculative allegations concerning Plaintiff's lost wages and (2) cherry-picked high-dollar awards in unrelated litigations, which do not satisfy Defendant's burden to show that the amount in controversy exceeds $75,000.00 by a preponderance of the evidence.

Defendant's calculations of Plaintiff's lost wages and benefits are based on unsupported assumptions regarding Plaintiff's alleged lack of mitigation, her hours worked, and the value of her alleged benefits. Plaintiff has mitigated her damages by earning about $45,000 from subsequent employment and/or self-employment since her wrongful termination through the date of removal of this action.

Defendant's calculations of Plaintiff's emotional distress damages, punitive damages, and attorneys' fees rely on nothing more than cherry-picked high dollar awards in unrelated litigations that do nothing to show Plaintiff's likely damages and fees in this case. If all a defendant had to accomplish to overcome remand in an employment case is show large, yet isolated, jury verdicts arising from the breadth of litigation in California's courts, then virtually every remand motion filed would be denied. Courts regularly grant remand, however, because that is not the standard. The standard remains that Defendant must offer evidence establishing that it is more likely than not that the amount in controversy exceeds $75,000.

Defendant has failed to provide such evidence. Thus, the Court should remand this action to State court.

II. LEGAL ANALYSIS

A. Legal Standard.

The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction" and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988), *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F .2d 815, 818 (9th Cir. 1985), and *Libhart v. Santa Monica Dairy Co.*, 592 F .2d 1062, 1064 (9th Cir. 1979)); *see Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009) ("[t]he removal status is strictly construed against removal jurisdiction.") "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Id.* (citing *Nishimoto v. Federman-Bachrach & Assoc.*, 903 F.2d 709, 712 n. 3 (9th Circ. 1990), and *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)).

Defendant must submit "summary-judgment-type evidence" to establish that the $75,000.00 minimum amount in controversy will be met or exceeded at trial because it is not facially apparent from the Complaint that the amount in controversy exceeds $75,000. *See* *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (citing *Allen v. R& H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)); *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F. Supp. 1196, 1198 (N.D. Cal. 1998) (where a complaint does not specify the amount of damages, the removing defendant must submit actual evidence supporting the minimum amount in controversy has been met).

Defendant's assertion that *Dart Cherokee Basic Operating Co., LLC v. Owens*, 135 S.Ct. 547 (2014) represents a "movement away from antiremoval presumption in diversity cases," is without merit. (ECF No. 11, Opposition to

Motion to Remand, at 9:12-16.) Setting aside that *Owens* was a class action case involving removal based on the Class Action Fairness Act, several District court decisions post-*Owens* confirm that courts "should 'strictly construe the removal statute against removal jurisdiction.'" *Baumann v. BMW of North America, LLC*, cv-17-01707-BRO, 2017 WL 1538155, *3 (C.D. Cal. Apr. 26, 2017) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (affirming that the "removing party therefore bears a heavy burden to rebut the presumption against removal); *Janktns v. Wells Fargo Bank, N.A.*, cv-17-00887-BRO, 2017 WL 1181562, *3 (C.D. Cal. Mar. 29, 2017) (same); *Health Pro Dental Corp. v. Travelers Property Casualty Company of America*, cv-17-00637-BRO, 2017 WL 1033970, *3 (C.D. Cal. Mar. 17, 2017) (same); *Mitchell v. Grubhub Inc.*, cv-15-05465-BRO, 2015 WL 5096420, *2 (C.D. Cal. Aug. 28, 2015) (same).

B. Defendant Has Not Established by Preponderance of Evidence that the Amount in Controversy Exceeds $75,000 at the Time of Removal.

Defendant has offered no "summary-judgment-type evidence" to establish the amount in controversy, and instead has relied on unsupported assumptions concerning Plaintiff's economic damages and a sampling of convenient, yet unrelated jury awards.

1. Defendant's Calculation of Plaintiff's Lost Wages and Employment Benefits is Based on Unsupported Assumptions.

Defendant's contention that Plaintiff's lost earnings and benefits amount to $73,339.04 is based on assumptions for which Defendant has provided no evidence and/or which are contradicted by the evidence. (ECF No. 11, Opposition to Motion to Remand, at 7:23-8:9.)

Defendant's contention assumes that Plaintiff has not fully or partially mitigated her economic losses. Defendant has no knowledge, nor any proof, supporting its assumption that Plaintiff has not secured any employment over the past nineteen (19) months. For purposes of establishing jurisdiction, the burden rests on Defendant, not Plaintiff, to establish the amount of mitigation – a burden that Defendant has failed to satisfy. *See Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090-91 (9th Cir. 2003) (holding speculative and conclusory allegations as to the amount in controversy are inadequate for jurisdictional purposes.)

Defendant's contention also assumes that Plaintiff regularly worked, and would have continued to work at least forty (40) hours per week. Defendant provides no evidence in support of this critical assumption. For example, Defendant provides **(1)** no evidence of Plaintiff's work schedule for any period of Plaintiff's employment, **(2)** no evidence of Plaintiff's hours worked, e.g. punch-in/out records, for any period of Plaintiff's employment, and **(3)** no testimonial evidence concerning the number of hours that Defendant's employees witnessed Plaintiff work. In fact, Plaintiff's Offer Letter, which Defendant submitted as evidence in support of its opposition, confirms that Plaintiff's work hours "may vary based on business need and/or request(s) of your supervisor or management," i.e. Plaintiff did not work a fixed and/or minimum amount of forty (40) hours per week.[1] (ECF No. 11-1, Declaration of Kathryn Hivick, Exhibit B, at 8.)

Third, Defendant has not provided sufficient evidence in support of its position that (1) Paid Leave Bank Accrual benefits in the amount of $5,755.20, and

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[1] While the Declaration of Kathryn Hivick, filed in support of Defendant's opposition, states that "Plaintiff's regular work schedule [was] 40 hours per week," this statement is based on "Plaintiff's employer offer letter," which, as set forth herein, does not confirm that Plaintiff was regularly scheduled to work 40 hours per week. (ECF No. 11-1, Declaration of Kathryn Hivick in support of Defendant's Opposition, at 2:26-3:3.)

(2) Employer Contribution Vision, Employer Contribution Dental, and Employer Contribution 401k in the total amount of $2,183.84, should be included in the calculations of the amount in controversy. (ECF No. 11-1, Declaration of Kathryn Hivick, at 3:13-4:2.) Defendant provides nothing more than "blanket unsupported statements" by its human resources employee in a declaration, in support of its calculation. *Melendez v. HMS Host Family Restaurants, Inc.*, cv-11-3842-ODW, 2011 WL 3760058, *3 (C.D. Cal. Aug. 25, 2011) (affirming that "blanket unsupported statements made by a human resources manager in a declaration" "in support of [the defendant's] conclusion that certain health benefits must be included" are "simply insufficient"). Defendant's single declaration falls far short of "actually proving the facts to support jurisdiction. Id.; *see* Gaus, 980 F.2d at 567.

2. Plaintiff's Lost Wages Stand at No More than $20,400 Based on Defendant's Liberal Calculations.

Defendant contends that Plaintiff's lost wages amount to $65,400. (ECF No. 11-1, Declaration of Kathryn Hivick, at 2:26-3:1.) However, Defendant's calculation does not account for the fact that Plaintiff has mitigated her damages by earning about $45,000 from subsequent employment and/or self-employment since her wrongful termination in October 2015 through the date of removal of this action. (Declaration of Lisa Castle filed concurrently herewith, ¶ 2.)[2] Accordingly, even if the Court accepts Defendant's calculations and its unsupported assumptions thereto, Plaintiff's lost wages at the time of removal were $20,400.00 ($65,400 - $45,000). *See* *Lamke v. Sunstate Equip. Co.*, 319 F. Supp. 2d 1029, 1033 (N.D. Cal. 2004) (holding that in order to determine the amount in controversy, a court may have to consider facts regarding mitigation of damages under the preponderance of the evidence test); *see also* *Birkenbuel v. M.C.C. Constr. Corp.*, 962 F.Supp. 1305 (D. Mont. 1997) (holding that where mitigation is a mandatory consideration in the statutory definition of a claim's potential damages, the court must consider evidence of mitigation in deciding whether to remand to state court).

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[2] Defendant would have discovered this information if it had conducted the most basic discovery before it had "rushed to the courthouse" to remove this action.

Defendant's contention that Plaintiff will be owed $65,400 in lost wages is completely unsubstantiated. In determining the amount in controversy, the Court should only consider that Plaintiff has suffered, at most, $20,400.00 in lost wages based on Defendant's calculations. Accordingly, and because Defendant has failed to provide evidence of any damages other than this $20,400.00 amount as set forth below, the Court should remand this action.

3. Defendant Has Failed to Demonstrate that Plaintiff's Emotional Distress Damages, added to the Remainder of Plaintiff's Alleged Damages, Will Exceed $75,000.

Defendant has not offered a single shred of evidence that this specific plaintiff, Lisa Castle, has suffered any specific monetary amount of non-economic damages. Defendant has not done so, and cannot do so, because Defendant has not pursued any discovery to date. *See* *Crocker v. Sky View Christian Academy*, No. 3:08-CV-00479-LRH-VPC, 2009 WL 77456, *2 (D. Nev. Jan. 8, 2009) (affirming that emotional distress damages are unique to each plaintiff and thus typically require discovery usually in the form of the plaintiff's testimony before they can be readily quantified).[3]

[3] It is well understood that there is no precise formula available to calculate the exact amount of emotional distress damages a plaintiff may be awarded. *See* *Pool v. City of Oakland*, 42 Cal. 3d. 1051, 1067 (1986). Moreover, rightly or wrongly, juries often award emotional distress damages based on the amount of economic damages. Thus, at just over $20,000 in economic damages based on Defendant's calculations, it is foreseeable that a jury could very easily award very little in emotional distress damages to Plaintiff.

Instead of providing actual evidence, Defendant lists verdicts pulled out of thin air as supposed proof that juries can award large sums of non-economic damages. (ECF No. 11, Opposition to Motion to Remand, at 14:23-15:14.) Defendant (1) fails to provide any context for the awards, (2) fails to consider the circumstances of these actions that may have justified such awards, and (3) fails to provide evidence that Plaintiff will likely achieve a similar result.[4] Such verdicts do not demonstrate, by a preponderance of the evidence, the likely amount of emotional distress damages Plaintiff may recover if she prevails on her claims. *See Harrison v. Toys "R" US-Delaware, Inc.*, No. CO-65583 RBL, 2006 WL 3694452, *1 (W.D. Wash Dec. 13, 2006) (without a showing of sufficient cases to demonstrate a trend, one or two isolated verdicts offer little probative value in demonstrating the likelihood of any specific amount of non-economic damages award). Defendant's reliance on previous awards of emotional distress in inherently speculative. Without more, Defendant's assertions regarding these damages in insufficient to satisfy its burden of proof. [5]

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[4] Each of the two verdicts Defendant cites are readily distinguishable from this case. *Kolas v. Access Business Group LLC*, 2008 WL 496470 (Los Angeles Super. Ct.) involved a *career* technician who had worked as such for *more than nine years* (unlike Plaintiff), who alleged he was fired based on his age (unlike Plaintiff), and involved $637,000 in economic damages, i.e. damages much higher than Plaintiff can seek. *Lopez v. Bimbo Bakeries USA Inc.*, 2007 WL 4339112 (San Francisco Super. Ct.) involved a *pregnant employee* who requested fifteen minute breaks every two hours and whom the defendant terminated while the plaintiff was *four months pregnant*. While the loss of the job has impacted Plaintiff negatively, it cannot be compared to the loss of employment and security during a pregnancy as the plaintiff in *Lopez* suffered.

[5] Defendant cites to *Velez v. Roche*, 335 F. Supp. 2d 1022, 1040 (N.D. Cal. 2004) to contend that "it is reasonable to **assume** that Plaintiff could receive a similar award in emotional distress damages if she were to prevail at trial." (ECF No. 11, Opposition to Motion to Remand, at 15:4-8) (emphasis added). However, Defendant (1) provides no evidence that Plaintiff has "suffered heightened mental anguish," as required by *Velez*, and (2) provides no evidence to support its **assumption** that Plaintiff could receive hundreds of thousands of dollars for non-economic damages.

4. Punitive Damages are Speculative and Thus Should Not be Considered in Determining the Amount in Controversy.

The removing party must prove punitive damages are likely and, also, the amount of punitive damages the plaintiff would likely receive. *See Surber v. Reliance Nat'l Indem. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000); *see also McCaa v. Mass. Mut. Life Ins. Co.*, 330 F. Supp. 2d 1143, 1149 (D. Nev. 2004) (a defendant must present evidence that any "punitive damages, coupled with other relief that Plaintiff seeks, will more likely than not exceed the jurisdictional minimum").

Defendant has provided no evidence that it is more likely than not that Plaintiff will receive punitive damages, or evidence of the amount of punitive damages Plaintiff would likely receive. Instead, again, Defendant simply provides examples of unrelated, isolated jury awards without demonstrating how these cases are analogous to Plaintiff's claims.[6] Even if Defendant had demonstrated that Plaintiff will likely receive punitive damages, which it has not, Defendant has failed to demonstrate, with any reliability, the amount of punitive damages Plaintiff will likely receive. Accordingly, because Defendant has failed to meet this burden as well, the Court should not weigh punitive damages in determining whether the amount in controversy has been met.

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[6] Defendant cites to (1) *Stevens v. Von Companies, Inc.*, Superior Court of Ventura County, No. SC041162, (2) *Ortiz v. 25th Century Services Inc.*, Superior Court of Ventura County, Case No. CIV236289, and (3) *Ko v. The Square Group LLC*, Superior Court of Los Angeles County, Case No. BC 487739. However, Defendant has not and cannot provide any facts concerning the basis for the punitive damages awards granted in these cases. This confirms that Defendant's attempt to analogize to these cherry-picked cases is inherently unreliable.

5. Defendant Has Failed to Provide Any Evidence of Plaintiff's Attorneys' Fees.

Defendant again fails to provide any evidence that can permit the Court to consider attorneys' fees in calculating the amount in controversy.

At the outset, District courts within the Ninth Circuit have repeatedly declined to include prospective attorneys' fees in determining the amount in controversy. *See e.g.*, *MIC Philberts Invs. v. Am. Cas. Co. of Reading Pa.*, 12-cv-0131-AWI, 2012 WL 2118239, *5 (E.D. Cal. June 11, 2012); *Green v. Party City Corp.*, cv-01-09681-CAS, 2002 WL 553219, *2 & n.3 (C.D. Cal. Apr. 9, 2002); *Faulkner v. Astra-Med, Inc.*, c-9902562-SI, 1999 WL 820198, *4 (N.D. Cal. Oct. 4, 1999). In such cases, the courts have found that attorneys' fees are in the control of the client and counsel and may be avoided or accrue over years, depending on legal strategy. *See Grieff v. Brigandi Coin Co.*, c-14-214-RAJ, 2014 WL 2608209, *3 (W.D. Wa. June 11, 2014). Accordingly, the only attorneys' fees that the Court should consider are those fees that have **accrued through the date remand is considered**.

Here, Defendant provides no evidence of (1) Plaintiff's counsel experience, (2) Plaintiff's (or Defendant's) counsel's rate of compensation, or (3) how many hours of attorney-work Plaintiff may claim to date. *See Ragano v. Urban Fulfillment Services LLC*, cv-16-00479-BRO, 2016 WL 1610594, *3-4 (C.D. Cal. Apr. 21, 2016) (granting motion to remand primarily because the defendant "fail[ed] to demonstrate adequately that attorney's fees in this case would more likely than not exceed $75,000" where the defendant's "declaration nor the biograph attached indicate the estimated billable hours, the approximate amount of work to be completed, plaintiff's counsel's hourly billing rate"); *Surber*, *supra*, 110 F. Supp. 2d at 1232 (remanding case where defendant failed to meet its burden of establishing the amount in controversy in part because "[d]efendant [did] not estimate[] the amount of time that the case [would] require, nor ha[d] it revelaed plaintiff's counsel's houring billing rate"); *cf. Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp. 2d 1004, 1011 (N.D. Cal. 2002) (explaining that defendant provided a declaration regarding the hourly rate and approximate fees billed in the case thus far).

Instead, Defendant again cites to cherry-picked and unrelated cases as examples of what kinds of attorneys' fees awards other cases have obtained, which, as set forth herein, does not amount to evidence. Defendant also baldly declares that $30,000 is "a conservative estimate" of Plaintiff's attorneys' fees. (ECF No. 11, Opposition to Motion to Remand, at 16:13-15.) However, such a "bald statement, unsupported by any evidence, does not suffice to create subject matter jurisdiction." *Surber, supra*, 110 F. Supp. 2d at 1232. Moreover, Defendant's unsupported estimate of $30,000.00, when added to the $20,400.00 in lost wages, does not amount to more than $75,000 in controversy.

Accordingly, because Defendant has once more failed to meet its burden, the Court should not consider attorneys' fees in weighing the amount in controversy.

III. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests the Court to grant Plaintiff's Motion for Remand and remand this case to State court.

DATED: May 8, 2017

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